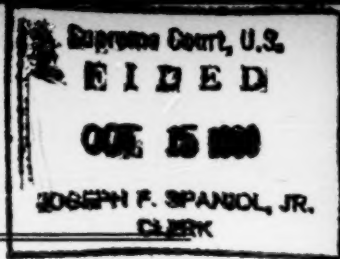


90-6230

No. _____



In The
Supreme Court of the United States
October Term, 1990

DARRELL S. CLASPILL,

Petitioner,

v.

THE MISSOURI PACIFIC RAILROAD,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MISSOURI

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QUESTIONS PRESENTED FOR REVIEW

1. IS 23 U.S.C. § 409 TO BE APPLIED RETROACTIVELY TO DOCUMENTS PREPARED PRIOR TO THE STATUTE'S EFFECTIVE DATE AND TO WITNESS TESTIMONY BASED UPON EVENTS OCCURRING PRIOR TO THE STATUTE'S EFFECTIVE DATE?
2. IF 23 U.S.C. § 409 IS DEEMED TO HAVE RETROACTIVE APPLICATION DOES ITS APPLICATION TO PROCEDURAL EVIDENTIARY RULINGS IN THE STATE TRIAL COURTS VIOLATE THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?
3. IS THE REASONING OF THE MISSOURI SUPREME COURT THAT 23 U.S.C. § 409 WILL AUTOMATICALLY BE APPLIED RETROSPECTIVELY IN CONFLICT WITH RULES OF STATUTORY CONSTRUCTION OF THIS COURT SET FORTH IN *Kaiser Aluminum and Chemical Corp. v. Bonjorno*, 110 S.Ct. 1570. (1990), *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), 94 2006, 40 L.Ed.2d 476 (1974) and *United States v. Security Industrial Bank*, 459 U.S. 70, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982)?

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No. _____

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**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MISSOURI**

OPINIONS BELOW

The opinion of the Missouri Supreme Court may be found at 793 S.W.2d 139 (Mo. banc 1990). A copy of the opinion is set forth in full in Appendix A.

The ruling of the trial court on the Defendant's Motion in Limine concerning 23 U.S.C. § 409 is set forth as Appendix B.

JURISDICTION

Jurisdiction of this Court to review the *en banc* decision of the Supreme Court of Missouri filed and entered July 31, 1990, is invoked under 28 U.S.C. § 1257(a). Jurisdiction is based on two separate grounds. First, that the validity of a statute of the United States is drawn in question. As to the fact that a statute is drawn in question when its constitutionality as applied is challenged, see *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979). The second basis for jurisdiction is that rights, privileges and immunities of the parties under the statutes of the United States are involved. More particularly the issues presented concern rights and privileges under the Federal Employers Liability Act (45 U.S.C. § 51 et seq.) and claims of evidentiary rights and privileges in relation to the application of 23 U.S.C. § 409.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

United States Constitutional Provisions

amend. X provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Federal Statutes

23 U.S.C. Section 409 provides:

Admission as evidence of certain reports and surveys

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data

compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data. (Added Pub.L. 100-17, Title I § 132(a), Apr. 2, 1987, 101 Stat. 170.)

STATEMENT OF THE CASE

This is an action by a railroad engineer under the Federal Employers Liability Act for negligence of his employer in the maintenance of two railroad grade crossings at which collisions occurred resulting in severe emotional injuries to the plaintiff described as post traumatic stress disorder. Trial of the case resulted in a jury verdict in favor of the respondent finding no liability of the respondent for the condition of the crossings in issue.

Prior to the trial of the case the respondent filed a motion in limine with the court seeking to prohibit evidence prepared prior to the effective date of 23 U.S.C. § 409 concerning the grade crossings in issue. A copy of the motion in limine and suggestions in support is found in Appendix C. A copy of petitioner's suggestions in opposition to that motion in limine including the challenge on constitutional grounds is set out herein at

Appendix D. The trial court ruled that 23 U.S.C. § 409 would be applied retroactively as is seen in the order of the court found in Appendix B. The evidence that was excluded and presented by the petitioner in an offer of proof was two documents and portions of the deposition testimony of Mr. Leroy Meisel, a railroad safety specialist working for the State of Missouri. That excluded evidence is set forth in Appendix E.

At trial one of the petitioner's theories of negligence against the respondent was that as to the Adrian, Missouri first street crossing where a collision occurred May 15, 1987, the respondent was negligent in failing to install flashing lights warning approaching motorist that a crossing train was near the intersection. One of the theories of negligence against the respondent as to the June 1, 1987, collision in Butler, Missouri was that the respondent was negligent in failing to have active crossing protection devices which were a combination of flashing lights and automated gates. The excluded evidence which the trial court refused based upon its retroactive application of 23 U.S.C. § 409 concerns the Adrian, Missouri crossing.

The documentary evidence which was excluded by the trial court consisted of plaintiff's exhibit 107 and plaintiff's exhibit 108. Exhibit 107 is a listing of passively protected (nonelectrically controlled) grade crossings in the state of Missouri ranked based upon the degree of need for upgrading to actively protected crossings. The first street Adrian, Missouri crossing is listed as the fifth crossing on this priority list. This priority list was prepared October 15, 1984. Exhibit 108 is a field inspection form prepared May 9, 1985 regarding the Adrian, Missouri first street crossing. This document was prepared as

a result of a meeting at the first street crossing at which government and railroad personnel were present. The document is signed by R. W. Cunningham on behalf of the respondent railroad and sets forth the need for flashing light signals at the first street crossing in Adrian. The testimony of Leroy Meisel was presented to the trial court by deposition. The excluded testimony of Railroad Safety Specialist Meisel included that the priority list (Exhibit 107) would have been given to the respondent railroad in January of 1985 and that of the some three thousand eight hundred passively protected grade crossings in the state of Missouri which were ranked by the department of transportation, the first street crossing in Adrian was considered the fifth most in need of active protection signals.

Petitioner did have additional evidence at trial concerning the need for upgraded signaling devices at the first street crossing in Adrian, Missouri. One of the witnesses called by petitioner was Dr. Thomas Mulinazzi a Professor of Civil Engineering and Associate Dean of the School of Engineering at the University of Kansas. Mr. Mulinazzi gave his professional opinion that at the time of the collision in issue the first street crossing in Adrian should have had an active form of traffic control device, namely, flashing lights. However, Dr. Mulinazzi in cross examination acknowledged that the *Manual on Uniform Traffic Control Devices* provides that the determination of need and selection of devices at grade crossings is made by the public agency having jurisdiction at the crossing and that the railroad would have to obtain the state's permission to install new protective devices. This is to be contrasted to the excluded testimony wherein by the field

inspection report (Exhibit 108) the jury would have been told of the state's specific advice to respondent of the need for upgraded crossing protection.

REASONS FOR GRANTING THE WRIT

Jurisdiction to hear this case under 28 U.S.C. § 1257(a) is established by either of two criteria. Jurisdiction is founded upon the issue of whether or not a retroactive application of 23 U.S.C. § 409 is constitutionally permissible and also because the case presents issues of the rights, privileges and immunities of the parties under the Federal Employers Liability Act. (45 U.S.C. § 51 et seq.) and 23 U.S.C. § 409.

This Court's determination of which cases to review by way of a Writ of Certiorari is governed by Rule 10(c), Supreme Court Rules which provides that state court cases will be reviewed which either: (1) present an important question of federal law; or (2) involve a case in which the state court of last resort decided a question of federal law that conflicts with opinions of the United States Supreme Court. Petitioner will establish that this case should be reviewed under both criteria.

Preliminarily, specific mention should be made of the conditions of review that are a part of the jurisdictional requirement of 28 U.S.C. § 1257(a). Those conditions are: finality of the state court judgment; made by the highest court of the state; the raising and the adjudication of a substantial federal question in the state court proceeding; and, that the judgment does not rest upon a nonfederal ground. The opinion of the Missouri Supreme Court *en*

banc that is contained herein as Appendix A establishes finality of the case in the state court system in that nothing is left to be judicially decided, *Republic National Gas Co. v. Oklahoma*, 334 U.S. 62, 67, 68 S.Ct. 972, 92 L.Ed.1212 (1948). Likewise the raising and the adjudication of the federal question in the state court proceeding is established by review of the Appendices A, B, C and D which trace the federal question issue from its beginnings in a pretrial motion in limine through the decision of the Missouri Supreme Court *en banc*. Substantiality of the federal question has been defined as not frivolous and not specifically settled by prior Supreme Court pronouncement, *Equitable Life Insurance Society v. Brown*, 187 U.S. 308, 311, 23 S.Ct. 123, 47 L.Ed. 190 (1902), and, one which requires analysis and exposition for its decision, *Milheim v. Moffat Tunnel Improvement District*, 262 U.S. 710, 717, 43 S.Ct. 694, 67 L.Ed. 1194 (1923). Even a cursory review of the appendices will reveal that the issues of retroactive application of 23 U.S.C. § 409 and whether or not such retroactive application of a procedural statute in state court proceedings violates the tenth amendment to the United States Constitution are substantial federal questions. No federal court in a published opinion has yet ruled on the interpretation of 23 U.S.C. § 409. As to the final jurisdictional condition that the judgment does not rest upon a nonfederal ground, suffice it to say that the entire appeal of this case in the Missouri Supreme Court *en banc* was premised upon the issue of whether or not 23 U.S.C. § 409 would be applied retroactively and if so if such retroactive application violated the tenth amendment to the United States Constitution. There was no other way for the case to be decided.

(a) Important question of Federal Law

Under Supreme Court Rule 10(c) the first category for accepting review of cases for which jurisdiction is obtained pursuant to 28 U.S.C. § 1257(a) is that the case must involve an important question of federal law. There are several reasons why this case presents important questions of federal law. What is "special and important" in this context has been defined as presenting a problem beyond the academic or the episodic, *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897 (1955). It has been held that the accommodation of state and federal interest under the constitution will meet the important question of federal law test, *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 94 S.Ct. 2108, 40 L.Ed.2d 660 (1974). Uniformity of application of federal laws has also been held to meet the important question of federal law test. See for example *Donaldson v. United States*, 400 U.S. 517, 91 S.Ct. 533, 27 L.Ed.2d 580 (1971) (enforcement of federal revenue laws) and also Federal Employers Liability Act cases which have held that the standards of evidence in F.E.L.A. cases as well as the uniformity of such standards meet the "important question of federal law" requirement, *Basham v. Penn. R. Co.*, 372 U.S. 699, 83 S.Ct. 965, 10 L.Ed.2d 80 (1963), *Rogers v. Missouri Pacific R.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957) and *Brown v. Western Ry. of Ala.*, 338 U.S. 294, 70 S.Ct. 105, 94 L.Ed. 100 (1949).

The issue of retroactive application of 23 U.S.C. § 409 presents a significant opportunity for this court to address an important evidentiary question that will effect many F.E.L.A. claims in both state and federal courts. Of course the application of this evidentiary statute is much

broader than just F.E.L.A. claims. It is easy to imagine that the interpretation of this statute will effect state law personal injury cases brought by motorists or their survivors as well as construction litigation concerning grade crossings, bridges, intersections or other highway accident sites. By virtue of the respondent's argument on appeal in the state court proceeding that the petitioner did not make a submissible case, this case presents an important federal question as to the amount of proof necessary in a F.E.L.A. case to sustain a claim for mental or emotional injuries without accompanying physical injuries.

Petitioner has also invoked jurisdiction on the basis of the constitutional invalidity of 23 U.S.C. § 409 as applied to state court proceedings when such statute is determined to be procedural and applied retroactively in state court trials. It is acknowledged that this court has most recently spoken on the scope of the tenth amendment in the case of *State of South Carolina v. Baker*, 485 U.S. 505, 108 S.Ct. 1355, 99 L.Ed.2d 592 (1988) stating that the protection of states' rights referenced in the tenth amendment is to be accounted for through participation in the political process. It is respectfully urged that this case reexamined the question of the scope of the tenth amendment particularly as to matters of administration of state court branches of government. Necessarily the Missouri Supreme Court has held that the statute in question is only affecting the administration of the state courts by deciding that the statute is procedural and not effecting substantive rights.

Even if the majority opinion in *State of South Carolina v. Baker*, *supra*, is not to be challenged, this case presents

the issue of whether or not the national political process has operated in a defective manner to the disadvantage of the states recognized in the *Baker* opinion as that circumstance to which the tenth amendment does offer protection to the states. The existence of such extraordinary defects in the political process are as follows: (a) the lack of any legislative history evidencing any reasoning behind the adoption of 23 U.S.C. § 409; (b) the capriciousness of changing the language of the statute from stating that no report, etc. shall be *required* to be admitted into evidence to no report, etc. shall be admitted into evidence (see 1987 U.S. Code, Cong. and Adm. News 101 Stat. 132 at p. 91 for the Senate Report of the Bill and p. 157 for the House Report of the Bill), and (c) the lack of substantial relationship between a retroactive application of the law and any primary purpose of the legislation, The Surface Transportation and Uniform Relocation Assistance Act of 1987.

(b) Conflict between the decision of the Missouri Supreme Court and decisions of this Court

The Missouri Supreme Court in its decision in this case ruled that simply because the statute in question is described as procedural as opposed to substantive the law would have retroactive application to events which occurred prior to April 2, 1988, the effective date of the statute. This ruling ignored the many precedents of this court that statutes are presumed to operate prospectively unless there is a clear indication to the contrary set forth within the legislation.

In the case of *United States v. Security Industrial Bank*, 459 U.S. 70, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982) this court sets forth well known rules of statutory construction which authority was ignored by the Missouri Supreme Court in its decision *sub judice*. The Court there states (459 U.S. at 79):

"The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student. Compare 1 C. Sands, Sutherland on Statutory Construction § 1.06 (4th Ed. 1972), with *Linkletter v. Walker*, 381 U.S. 618, 622-625 (1965). This court has often pointed out:

" '[T]he first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . the rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights. . . unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." ' *Union Pacific R. Co. v. Laramie Stockyards Co.*, 231 U.S. 190, 199 (1913) (citations omitted).

"See e.g. *United States Fidelity & Guaranty Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314 (1908) ('the presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other'); *United States v. Schooner Peggy*, 1 Cranch, 103, 110 (1801)."

In its opinion in this cause the Missouri Supreme Court made passing reference to the case of *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), 94 S.Ct.

2006, 40 L.Ed.2d 476 (1974). However, the Missouri Supreme Court did not seek to analyze the retroactive application of 23 U.S.C. § 409 in terms of congressional intent which even under *Bradley, supra*, is recognized as governing the issue of retroactive verses prospective application.

The Missouri Supreme Court in its opinion in this cause is further in conflict with the very recent decision of this court in *Kaiser Aluminum and Chemical Corp. v. Bonjorno*, 110 S.Ct. 1570 (1990). In that case the court recognized that a federal statute which governs the rate of interest which is to be allowed after judgment would be applied prospectively based upon a determination that such a prospective application was the intention of the United States Congress. Additionally, the Missouri Supreme Court opinion *sub judice* is in conflict with both *Bradley v. Richmond School Board* and *Kaiser Aluminum and Chemical Corp. v. Bonjorno, supra*, in that those cases both acknowledge that a statute will not be applied retrospectively where such application would result in manifest injustice to the parties. Certainly the denial of an F.E.L.A. claimant's ability to present substantial important evidence on the question of his employer's negligence will result in manifest injustice to Mr. Claspill.

Finally, it is suggested that the Missouri Supreme Court opinion in this cause by its mechanical determination that there is to be a retrospective application of 23 U.S.C. § 409 has done great violence to the line of Supreme Court authorities which have long held that legislation should be applied prospectively unless there is a specific indication to the contrary. On this point see *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208,

109 S.Ct. 468, 471, 102 L.Ed.2d 493 (1988) and the concurring opinion of Justice Scalia in *Kaiser Aluminum and Chemical Corp. v. Bonjorno*, *supra*.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that this Court exercise its discretion in favor of reviewing the decision of the Missouri Supreme Court *en banc* in its determination that 23 U.S.C. § 409 is to be applied retrospectively and that upon review of this cause the Court reverse the decision of the Missouri Supreme Court and determine that the case be remanded for new trial for the prejudicial error in excluding relevant and material evidence on the issue of the respondent's negligence.

Respectfully submitted,

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APPENDIX

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APPENDIX A
SEAL
SUPREME COURT OF MISSOURI
en banc

DARRELL S. CLASPILL,)	No. 72264
Appellant,	)	DUPLICATE
vs.	)	OF FILING ON
MISSOURI PACIFIC	)	JUL 31 1990
RAILROAD COMPANY,	)	IN OFFICE OF
Respondent.	)	CLERK SUPREME COURT

APPEAL FROM THE CIRCUIT COURT
OF CLAY COUNTY
Honorable John R. Hutcherson, Judge

Darrell Claspill appeals from an adverse jury verdict and judgment in a Federal Employers Liability Act personal injury action. The question is whether 23 U.S.C. § 409 (1988) prohibits admission in evidence of certain documents created before its effective date, April 2, 1987, and if so, whether it violates the tenth amendment to the United States Constitution. Affirmed.

Darrell Claspill was Missouri Pacific's engineer at the time of three railroad grade crossing collisions that occurred over a three-month period in 1986 in Barton County and at Adrian and Butler, Missouri. Claspill brought negligence claims against Missouri Pacific under the Federal Employers Liability Act and against the driver in one collision and the two other drivers' estates, alleging the collisions had induced a post-traumatic stress disorder. He settled the claims against all defendants except Missouri Pacific before trial and abandoned the

claim arising out of the Barton County collision at trial. The Adrian and Butler negligence claims alleged the Railroad should have imposed a reduced speed limit through both cities, installed flashing lights at both crossings as well as a crossing gate and ringing bell at Butler, and cleared off vegetation on the right-of-way at Adrian. The jury found no negligence on the part of either party.

Before trial, the Railroad filed a motion *in limine* to exclude testimony of Leroy Meisel and two of plaintiff's exhibits concerning dangerous conditions at the Adrian crossing. The court sustained the motion under 23 U.S.C. § 409. The exhibits were a list of the most dangerous railroad crossings in Missouri and a Field Inspection Form proposing the addition of flashing signal lights at the Adrian crossing, compiled by the Public Service Commission and the Highway and Transportation Department. The excluded testimony of Mr. Meisel identified and explained the exhibits and stated the list of the most dangerous crossings was a priority listing for the use of federal funds. Claspill argues the trial court erred in excluding the evidence because it was relevant to the issue of liability; the statute should not have been applied retroactively to documents created prior to the effective date of the statute; and the statute should not have been applied to Leroy Meisel's testimony. He also argues that application of the federal statute in a state court works a violation of the tenth amendment of the United States Constitution and that retroactive application of the statute is contrary to Congress' intent in enacting it.

23 U.S.C. § 409 provides:

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data

compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144 and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

In Missouri, a statute dealing with procedure only is applicable to all pending cases (cases not yet reduced to a final judgment). *State ex rel. Faith Hospital v. Enright*, 706 S.W.2d 852 (Mo. banc 1986). *Enright* considered the retrospective application of a Missouri statute excluding from discovery proceedings the findings of peer review committees concerning health care provided to patients and held it was applicable retrospectively. In *O'Bryan v. Allen*, 108 Mo. 227, 18 S.W. 892 (1891), this Court held it was error to allow certain witnesses to testify because an amendment to the Dead Man's Statute should have been applied retrospectively. *O'Bryan* stated at 893: "Laws which change the rules of evidence relate to the remedy only, may be applied to existing causes of action, and are not precluded from such application by the constitutional provision," i.e., the rule against ex post facto laws. See also *State v. Clark*, 756 S.W.2d 565, 570 (Mo. App. 1988).

In *Martinolich v. Southern Pacific Transp. Co.*, 532 So. 2d 435 (La. App. 1988), cert. denied, 109 S. Ct. 3164 (1989), the Department of Transportation and Development

attempted to block discovery of priority lists created in 1979 and 1980 in a suit over an accident occurring in 1980. The trial court ruled the information was privileged under section 409, and the railroad appealed; the Louisiana court ruled that section 409 should be applied retroactively, relying on *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974).

The plain language of section 409 provides that certain information shall not be admitted into evidence if it was compiled "for the purpose of developing any highway safety construction improvement project which may be implemented utilizing federal-aid highway funds." In this case, the grade crossing surveys and lists were created before the enactment of this legislation in order to obtain federal funds. In the absence of specific congressional direction to the contrary, section 409 is subject to retroactive application.

Appellant contends that an application of this statute to actions filed in state court, particularly where the statute is construed to affect only procedural rights, violates the tenth amendment to the United States Constitution, which reserves all power not conferred to the federal government to the states. The tenth amendment, he argues, should be held to prohibit legislation that affects only state court procedure. He raises the specter of the federal government dictating such matters of judicial procedure as the number of jurors who may return a verdict in civil litigation and whether peremptory strikes of prospective jurors are allowed.

In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 551 (1985), the United States Supreme Court

delineated Congress' authority to regulate the states under the tenth amendment and the commerce clause, U.S. Const., art. I, § 8, cl. 3. The Court stated at 554:

[W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy."

Thus, the states must depend on the national political process for their tenth amendment protections and are not to create "judicially defined spheres of unregulable state activity." *South Carolina v. Baker*, 485 U.S. 505, 108 S.Ct. 1355, 1360 (1988). In the instant case, there is no argument that Missouri has been deprived of any right to participate in the national political process, *see id.* at 1361. Appellant's tenth amendment argument fails.

Appellant argues that because in certain criminal cases some evidentiary rules are given prospective application for constitutional and fairness reasons this Court should interpret 23 U.S.C. § 409 to apply prospectively only. Appellant provides no authority for the application of the criminal cases cites to this civil case.

The judgment is affirmed.

ANDREW JACKSON HIGGINS, Judge

BLACKMAR, C.J., ROBERTSON, RENDLEN,
COVINGTON, HOLSTEIN, JJ., and
PARRISH, Sp.J., concur.
Billings, J., not sitting.

APPENDIX B
IN THE CIRCUIT COURT OF
CLAY COUNTY, MISSOURI

DARRELL S. CLASPILL,	)	Case No.
	)	CV187-2389-CC
Plaintiff,)	
	)	Division Two
vs.)	
MISSOURI PACIFIC RAILROAD)	
Company, et al.,)	
)	
Defendants.)	

ORDER

Defendant has moved the Court to enter an order pursuant to 23 U.S.C. §409 excluding from evidence all documents, and testimony based upon documents, generated by the State Department of Transportation to obtain federal funding for any railroad-highway safety improvement project or pursuant to Sections 130, 144, and 152 of Title 23. After due consideration of the arguments and briefs of counsel for both parties, it is hereby ORDERED:

1. Documents showing the location and elevation of the tracks will be allowed into evidence subject to paragraph number 3;

2. Documents, and opinions based upon documents, which contain an opinion, evaluation or determination of the Missouri Department of Transportation or its agents identifying or evaluating the hazardous nature of an accident sight, or planning the safety enhancement of an accident sight, shall not be admitted into evidence for any purpose.

3. Counsel for both parties are instructed to approach the bench before introducing any exhibit or offering any testimony concerning information and documents potentially subject to 23 U.S.C. §409.

Entered this 19 day of September, 1988.

/s/ John R. Hutcherson
Honorable John R. Hutcherson
Clay County Circuit Judge

APPENDIX C
IN THE CIRCUIT COURT OF
CLAY COUNTY, MISSOURI

DARRELL S. CLASPILL,	)	Case No.
	)	CV187-
Plaintiff,	)	2389-CC
)	
vs.	)	Division Two
)	
MISSOURI PACIFIC RAILROAD)	
Company, et al.,)	
)	
Defendants.)	

DEFENDANT MISSOURI PACIFIC RAILROAD
COMPANY'S MOTION IN LIMINE
REGARDING TESTIMONY AND
DOCUMENTS SUBJECT TO 23 U.S.C. §409

Defendant moves the Court to enter an Order prohibiting all parties in this action from disclosing directly or indirectly, through testimony, documents, or opinions based upon documents, or entering into evidence any reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of the railway-highway crossings involved in this accident, on the grounds that the aforementioned information is prohibited from introduction into evidence by 23 U.S.C. §409.

Defendant specifically requests that all testimony of Leroy A. Meisel and Thomas Mullinazzi dependent on the above-referenced information be excluded, and any surveys, reports, schedules, lists or data obtained in the deposition of Mr. Meisel be excluded from evidence.

Respectfully submitted,
MISSOURI PACIFIC RAILROAD
COMPANY

By: /s/ Jay Michael Nadlman
Jay Michael Nadlman
(#33062)
William D. Hamblin
2801 Rockcreek Parkway
North Kansas City,
Missouri 64117
(816) 245-2891

Attorneys for Defendant

I hereby certify that a copy
of the foregoing was hand delivered
this 6th day of September, 1988, to:

J. Michael Cronan
CRONAN & MESSICK
9200 Ward Parkway, Ste. 675
Kansas City, Missouri 64114

/s/ Jay Michael Nadlman
JAY MICHAEL NADLMAN

APPENDIX D
IN THE CIRCUIT COURT OF
CLAY COUNTY, MISSOURI

DARRELL S. CLASPILL,	)	Case No.
Plaintiff,	)	CV187-2389-CC
vs.	)	Division Two
MISSOURI PACIFIC RAILROAD,	)	FILED
Defendant.	)	SEP 09 1988

**PLAINTIFF'S SUGGESTIONS IN OPPOSITION TO
THE MOTION IN LIMINE OF DEFENDANT MISSOURI
PACIFIC RAILROAD BASED UPON 23 U.S.C. §409**

Comes now plaintiff and for his suggestions in opposition to defendant's motion in limine concerning 23 U.S.C. §409 states as follows:

1. Assuming the application of the privilege contained at 23 U.S.C. §409 to various documentary evidence, the effective date of such statute is April 2, 1987, and it should not have retroactive effect to documents created prior to the effective date of such statute.

2. As applied to actions filed in state court, 23 U.S.C. §409 is unconstitutional in violating the Tenth Amendment to the United States Constitution, particularly if 23 U.S.C. §409 is construed to affect only procedural rights.

3. The intention of the Federal Congress in enacting 23 U.S.C. §409, a provision of the Surface Transportation and Uniform Relocation Assistance Act of 1987, was to limit the admissibility of documentary evidence that was

created as a result of the various research and development programs created under the STURA of 1987. The attached pages from the 1987 U.S. Code Cong. and Adm. News (pp. 66-84; 91-92; 98-99; 157; and 181-184) establish that the STURA of 1987 authorized significant new and comprehensive research and development for bridges (pp. 73-75), highway research (p. 81), and rail-highway crossings study (p. 98) to which studies the privilege contained as 23 U.S.C. §409 would apply.

4. The Congress' intent to limit the application of 23 U.S.C. §409 is further evidenced by both the Senate (p. 91) and House (p. 157) Reports on the Bill which speak in terms that the section provides that no report, etc. shall be *required* to be admitted into evidence while the actual language of the approved statute is something different.

5. The massive scope of the Surface, Transportation and Uniform Relocation Assistance Act of 1987 may be seen from the three-page index of that Act which is attached to this pleading as Exhibit B.

6. Many Federal cases recognize the well known rule that there is a presumption against retroactivity of statutes because of the need to protect reasonable reliance on prior settled law. Cases so holding include *NLRB v. St. Luke's Hospital Center*, 551 F.2d 476 (2nd Cir. 1976); *Puget Sound Power & Light Company v. Federal Power Commission*, 557 F.2d 1311 (9th Cir. 1977); *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496 (9th Cir. 1984); *National Wildlife Federation v. Marsh*, 747 F.2d 616 (___ Cir. 1984); and, *U.S. v. Kairys*, 782 F.2d 1374 (7th Cir. 1986), cert. denied, 106 S.Ct. 2258, 90 L.Ed.2d 703.

7. The Missouri Supreme Court has analyzed the question of retroactive versus prospective application of new laws stating that such analysis should be done not by labelling certain consequences but by applying principles of justice and fair play. Our Supreme Court, in the case of *State ex rel. St. Louis-San Francisco Railway Co. v. Buder*, 515 S.W.2d 409, has held (l.c. 411):

"It is best to keep in mind that the underlying repugnance to the retrospective application of laws is that an act or transaction, to which certain legal effects were ascribed at the time they transpired, should not, without cogent reasons, thereafter be subject to a different set of effects which alter the rights and liabilities of the parties thereto. Merely to label certain consequences as substantive and others as procedural does not give sufficient consideration to this principle, and notions of justice and fair play in a particular case are always germane."

Based upon the above and foregoing it is respectfully urged that 23 U.S.C. § 409 should be applied prospectively to documents prepared after the effective date of that legislation, April 2, 1987.

CRONAN AND MESSICK

/s/ J. Michael Cronan
J. MICHAEL CRONAN
Missouri Bar-No. 23723
9200 Ward Parkway, Suite 675
Kansas City, Missouri 64114
(816) 444-4900
ATTORNEY FOR PLAINTIFF

CERTIFICATE OF MAILING

Copy of the foregoing was hand delivered this 9th day of September, 1988, Jay Michael Nadlman, Esq., 2801

Rockcreek Parkway, North Kansas City, Missouri 64117,
Attorney for Defendant Missouri Pacific Railroad Com-
pany.

/s/ J. Michael Cronan
J. MICHAEL CRONAN

APPENDIX E

Deposition of Leroy A. Meisel, August 30, 1988.
(Offers of Proof as to the reading of the following sections of this deposition may be found in the Transcript at pp. 495 and 762-767.)

Page 14, line 4. A. " . . . Federal funds were frozen somewhere in late '85, I will say and there was not a list generated because we just maintained what we had, information we had."

line 13. Q. "I have marked with Deposition Exhibit 1 with today's date the page that you described earlier as the 1984 priority list, correct?"

line 16. A. Yes, sir

line 17. Q. What this represents is a priority listing for the use of federal funds, is that correct?

line 19. A. That is correct.

line 20. Q. Does it represent anything else?

line 21. A. No.

line 22. Q. Are you able to look at this list and find the ranking of the Adrian, Missouri, First Street crossing?

line 25. A. Yes, it's on the passive list and it's No. 5 on that

Page 15, line 1. list.

line 2. Q. That's No. 5 out of how many on the passive list?

line 3. I can't really tell you that. This is sequence numbers starting at 1,082, and it would be an awful thick list if we printed out all five thousand whatever crossings there are, so we took the top 25 crossings.

line 8. Q. When was this priority list actually prepared for the passive crossings?

line 10. A. October 15, 1984.

line 15. Q. Mr. Meisel, I have marked as Deposition Exhibit No. 2 the passive priority list prepared back in October of '84, is that correct?

line 18. A. That's correct.

line 19. Q. And there are in excess of 1,000 passive grade crossings in the state of Missouri, or there were at that time?

line 22. A. There was more than that. I would say there was more like 3,800 or so.

line 24. Q. Of those 3,800, the Adrian crossing at First Street was considered the fifth most dangerous in the

Page 16, line 1. state, is that correct?

line 4. A. It was the fifth needing protection.

line 6. Q. Right, the fifth most in need of protection.

line 8. A. In need of protection, yes, sir.

line 9. Q. Now, on Deposition Exhibit 1, that constitutes the top 24 on the list of the active crossings being considered for upgrade, is that correct?

line 12. A. That's correct

line 13. Q. Are you able to tell us, as to the 1984 list for active crossings, the position of the Mill Street crossing in Butler, Missouri?

line 16. A. It was not on that list.

line 17. Q. Would you be able to go to the records of the Department of Transportation and determine where below No. 24 the Mill Street crossing is listed on the list of active protected grade crossings?

line 21. A. Well, at this time I could not, since I would have to generate a computer printout.

line 23. Q. How long would it take to generate that computer printout?

line 25. A. Two hours.

Page 17, line 18. Q. Back in 1984 when the Deposition Exhibits 1 and 2 were created, did the Public Service commission at that time make those available to the various railroads which would be affected by the list?

line 23. A. We did not, per se, it was the Missouri Department of Transportation and Highways. I got that backwards, it was Highways and Transportation.

Page 18, line 1. Q. For instance, on this Exhibit No. 2, where the Adrian First Street crossing is No. 5 on the list, that information would have been communicated to the Missouri Pacific Railroad back in 1984, is that correct?

line 9. A. It would have been given to them in '85, I believe January of '85.

line 11. Q. Are you familiar with that procedure, to know that that is the way things are routinely and customarily done to make that information available?

line 15. A. The general procedure is we formulate the priority list, the Department of Highway and Transportation, they administer the federal funds, 203 Funds. This list is given to the highway department for their review, they, in turn, give it to the Federal Highway Administration here in Jeff City, which approves the list for funding. Once it is approved, then it goes back to the highway department, it is their responsibility to contact all people who are involved with the crossings on the list.

line 25. Q. When you say all the people that are involved with

Page 19, line 1. the crossings on the list, you mean the various railroads, is that correct?

line 3. A. The various railroads and the cities involved, or agencies.

Page 20, line 19. Q. Incidentally, the ranking numbers for these priority lists, when were they all created?

line 21. A. It would have been that date, October the 15th of '84.

line 23. Q. Was that done by a computer?

line 24. A. Yes, sir.

line 25. Q. And the values for the different variable, where

Page 21, line 1. was that information obtained?

line 2. A. That's obtained through inspection activity, and the crossing was looked at, information was verified before the priority list was actually run.

line 5. Q. Someone from the State of Missouri looked at every grade crossing in the state to formulate the 1984 priority list, is that correct?

line 8. A. No.

line 9. Q. Who looked at it?

line 10. A. Well, your question is quite broad. there are over 5,000 crossings in the state, and in a year's period one person cannot do all of it. So we normally take maybe the top 500 crossings, active and passive, and look at them, if they have got a high number, to verify the information to make sure that we come out with a good list.

line 17. Q. How did you get the original 500?

line 18. A. We generated a list to go off of.

line 19. Q. Where did you get the information to generate?

line 20. A. A tentative list.

line 21. Q. On the tentative list, where did you get the information to generate that tentative list?

line 23. A. Through past inspections.

line 24. Q. By the -

line 25. A. By the Division of Transportation.

Page 22, line 1. Q. Or its predecessor?

line 2. A. Or its predecessor, yes.

line 3. Q. Well, then, this tentative list of 500 was taken out of a potential of how many crossings that had actually been looked at?

line 6. A. I can't recall back then.

line 7. Q. Do you think that half of the crossings in the state had been looked at and some inspection report made to come up with the tentative list of 500?

line 10. A. I would way yes, over half, probably.

line 11. Q. Over half?

line 12. A. I would say yes, over half.

line 13. Q. Can you be any more specific than that?

line 14. A. No, I can't recall back that far.

line 15. Q. Now, would you repeat for me the criteria that are on the active crossings priority list, go into that formula?

line 22. A. Okay, it's the number of trains, times the trains' speeds, times the average daily traffic count, times the normal vehicle operating speed -

Page 23, line 1. Q. Is that the maximum speed limit posted?

line 3. A. No, that's the practical speed. - times ten to the minus fourths.

line 5. Q. Then in the passive protected crossings, what is the additional factor?

line 7. A. The additional factor is sight distance obstruction.

Page 87, line 15. Q. Mr. Meisel, I want to show you what has been marked as Deposition Exhibit 9 and ask you, if you can, to identify that.

line 18. A. Yes, it's a Missouri field inspection report form for First Street in Adrian, Missouri.

Page 89, line 18. Q. With regard to the preparation of this report, there was someone from the railroad at the site on May 9, 1985, is that correct?

line 21. A. Yes, sir.

line 22. Q. In fact, a representative of the railroad signed the report that's marked as Deposition Exhibit 9, is that correct?

Page 90, line 13. Q. And that is, in fact, your report.

line 14. A. that is our report.

Missouri
Field Inspection Form

Crossing: 443049H Date 5-9-85
Highway: Street: 1st City: Adrian
Dist: 7 Hwy System: Local Rural Roads
County: Bates County
Railroad: MP Div: North Subdv: Carthage
Branch: _____

E-8

MP: 277.90 Main Track: 1 Other:
 Trains Thru: 7 Switch: TT Speed: 49 Rng: 20 49
 ADT: 537 % Trucks: 8 VEH Speed: 20 SDO: 79%

Haz Mat: _____ School Bus: _____
 Other RR Sep Track: _____ Another RR This Track: _____

Protection: XB SS OS - RG BG CLO CLN
 2
 FL OFL HTS WW BL SPECIAL
 O N

Development: Residential Pavement Markings: No
 Crossing Angle 90 RR Adv Warning Signs Yes
 Traffic Lanes 2 Highway Surface Asphalt
 Xing Surface Asp-Tim Xing Width 24 Ft
 Condition Fair

Date	Time	Accident History Information		
		Reporting Railroad	Protection	
11/28/74	10:02A	MP	XB	
	Killed	Injured	Occupants	
	0	1	2	

E-9

PLAINTIFF'S
EXHIBIT

108

9-22-88

ENTERED
RSIS

Proposed Improvement Flashing Light Signals at Std.
Location

Remarks _____

Signed:

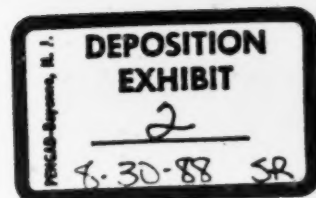
/s/ Leroy Meisel
Public Service
Commission

/s/ R.W. Cunningham
Railroad Company

/s/ E.L. Johnson
/s/ B.L. Montgomery
Highway &
Transportation Dept.

Local Government

/s/ illegible



MISSOURI PUBLIC SERVICE COMMISSION
TRANSPORTATION DIVISION
RAILROAD SAFETY DEPT

17:20 MONDAY, OCTOBER 15, 1984 17

REPORT PS10CI2P -- PROGRAM P10CI2HZ

PRIORITY INDEX WITH ACCIDENT INFORMATION, OPT=2

CF=CREW FLAGGED

WM=WATCHMAN

MA=MONEY AVAILABLE

PE=SIGNALS PENDING

PC=PROJECT COMPLETE

XA=XING ACCOUNT

----- PROT=PASSIVE -----

OBS	COUNTY	RR	CROSSING	CITY	STREET	HIGHWAY	NUMACC	MT	OT	CP	STAT	ADT	TM	SM	VS	TS	SDO	TI	HI
1082	BUCHANAN	BN	095199E	IATAN			0	1	2	XB		130	55	0	15	60	0.85	644	1190
1083	WAYNE	MP	446046X	PIEDMONT	IRIS		1	1	1	XB		300	16	0	25	40	0.95	480	936
1084	NEW MADRID	BN	665571G	PORTAGEVILLE	SEVENTH		0	1	0	XB		1510	4	0	20	30	0.85	386	715
1085	JASPER	BN	668216D	CARTHAGE	MAIN		2	1	4	XB		1270	3	3	35	20	0.26	533	672
1086	BATES	MP	443049H	ADRIAN	1ST		0	1	0	XB		537	7	0	20	49	0.79	368	659
1087	CASS	MP	443008D	HARRISONVILLE	LEXINGTON		0	1	1	XB		330	7	0	35	40	0.99	323	644
1088	PETTIS	MKT	411357A	SEDALIA	E 13TH		0	1	0	XB		1200	2	2	35	20	0.90	336	638
1089	GREENE	MP	445056A	SPRINGFIELD	SCENIC DR		1	0	2	XB		6000	0	2	35	10	0.48	420	622
1090	JACKSON	MP	422918S	KANSAS CITY	5TH		0	2	2	XB		350	12	8	35	25	0.00	613	613
1091	JASPER	MP	434857M	JOPLIN	MURPHY BLVD		0	1	0	XB		5900	2	0	35	10	0.48	413	611
1092	JACKSON	MP	442263J	INDEPENDENCE	COURTNEY ATRER		0	1	1	XB		161	12	0	30	50	1.00	290	580
1093	VERNON	MP	443129S	NEVADA			0	1	0	XB		220	7	0	40	49	0.92	302	580
1094	ST FRANCOIS	MP	446412W	IRON MOUNTAIN	BELLVIEW		1	1	0	XB		150	16	0	30	40	1.00	288	576
1095	JEFFERSON	BN	663889Y	CRYSTAL CITY	VIRGINIA		1	1	0	XB		910	5	0	25	30	0.68	341	573
1096	CARROLL	ATSF	005304H	CARROLLTON			0	2	0	XB		60	34	0	40	70	0.00	571	571
1097	LINN	ATSF	005141B	MARCELINE	RISBEE		0	2	0	XB		110	34	0	30	50	0.00	561	561
1098	PETTIS	MKT	411349H	SEDALIA	W 20TH & S HARR		0	1	0	XB		1300	2	2	35	20	0.50	364	546
1099	ST LOUIS	BN	664327G	EUREKA	WEST AVE		1	1	0	XB		200	12	0	20	60	0.85	288	533
1100	ADAIR	NW	480591D	KIRKSVILLE	W COTTONWOOD		2	1	0	XB		3939	1	0	35	20	0.90	276	524
1101	PETTIS	MKT	411351J	SEDALIA	S KENTUCKY		0	1	0	XB		1160	2	2	35	20	0.56	325	507
1102	JACKSON	ICG	293579G	GRAIN VALLEY	AIRPORT RD		1	1	1	XB		400	5	0	30	40	1.00	240	480
1103	PLATTE	BN	095197R	IATAN			2	1	0	XB		40	55	0	25	60	0.45	330	478
1104	PLATTE	BN	095361S	FARLEY	KISKER ROAD		0	1	1	XB		30	55	0	25	60	0.92	248	475
1105	PLATTE	BN	095376G	FARLEY			1	1	1	XB		30	55	0	25	60	0.90	246	470

BEST AVAILABLE COPY

APPENDIX F
IN THE CIRCUIT COURT OF
CLAY COUNTY, MISSOURI

DARRELL S. CLASPILL	)	Case No.
Plaintiff,	)	CV187-2389-CC
)	
vs.	)	Division Five
)	
MISSOURI PACIFIC RAILROAD,	)	Filed Oct 07 1988
Defendant.)	

MOTION FOR NEW TRIAL

Comes now plaintiff and moves the Court enter its Order granting him a new trial in this cause upon the following grounds.

1. The verdict of the jury is against the great weight of the evidence and manifest injustice will occur if this Court does not exercise its discretion to grant a new trial based upon the verdict being against the weight of the evidence.

2. The Court erred in excluding relevant evidence concerning liability of the defendant proffered in the testimony of witness Leroy Meisel through his deposition at the following pages:

08/30/88 Deposition, p. 14, lines 4-25; p. 15, lines 1-25; p. 16, lines 1-23; p. 17, lines 18-25; p. 18, lines 1-25; p. 19, lines 1-4; p. 20, lines 19-25; p. 21, lines 1-25; p. 22, lines 1-25; p. 23, lines 1-7; p. 47, lines 21-24; p. 48, lines 1-5; p. 87, lines 15-19; p. 89, lines 18-25; p. 90, lines 13-14.

3. The Court erred in sustaining the objections of the defendant to Plaintiff's Exhibit 107 which document

contained relevant evidence of the hazardous nature of the crossing at issue in Adrian, Missouri.

4. The Court erred in refusing into evidence Plaintiff's Exhibit 108, a report signed May 9, 1985 by a representative of the Missouri Pacific Railroad Company acknowledging the need for flashing light signals at the First Street crossing in Adrian, Missouri, which document was relevant evidence to the issue of liability of the defendant.

5. The plaintiff was denied his right to a jury trial of twelve impartial jurors by the intentional concealment by venireman Bernard Webb of the fact that he and his wife have been defendants in a lawsuit styled: Spelman Memorial Hospital v. Bernard and Linda Webb, having case No. CV186-1467AC, filed March 20, 1986. Counsel for plaintiff made specific inquiry as to those venire persons or members of their immediate families who had been defendants in litigation and although responses were given by other veniremen, Mr. Webb remained silent in response to this question.

6. Plaintiff was denied his right to a jury trial by an impartial jury in that venireman Howell J. Houston intentionally concealed the fact that he has been a defendant in the case styled: Household Finance Corporation v. Howell J. Houston, having case No. CV188-001439AC, filed March 14, 1988. Venireman Houston also intentionally concealed the fact that his wife was a co-defendant in the said case CV188-001439AC and that she was a defendant in a separate case of Sears, Roebuck & Company v. Marcia A. Houston having case No. CV188-001451AC, filed March 15, 1988 in the Associate Circuit Court for Clay

County, Missouri. Counsel for plaintiff in voir dire inquired as to those venire persons or members of their families who had been defendants in lawsuits and while other venire persons responded, venireman Howell J. Houston remained silent.

WHEREFORE, plaintiff moves the Court enter its Order granting him a new trial in this cause.

CRONAN AND MESSICK

/s/ J. Michael Cronan
J. MICHAEL CRONAN
Missouri Bar No. 23723
9200 Ward Parkway, Suite 675
Kansas City, Missouri 64114
(816) 444-4900
ATTORNEY FOR PLAINTIFF

CERTIFICATE OF MAILING

Copy of the foregoing was mailed this 5th day of October, 1988, Jay Michael Nadlman, Esq., 2801 Rock-creek Parkway, North Kansas City, Missouri 64117, Attorney for Defendant Missouri Pacific Railroad Company.

/s/ J. Michael Cronan
J. MICHAEL CRONAN
